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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

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COMMONWEALTH OF  
MASSACHUSETTS, by its DIVISION OF  
MARINE FISHERIES,

and,

STATE OF NEW HAMPSHIRE, by its  
FISH & GAME DEPARTMENT,  
DIVISION OF MARINE FISHERIES,

Plaintiffs,

v.

OTTO WOLFF, Acting Secretary of  
Commerce, et al.,

Defendants.

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Case No. 06-cv-12110 (EFH)

**FEDERAL DEFENDANTS'  
NOTICE OF CONSIDERATION OF  
MIXED-STOCK EXCEPTION**

Federal Defendants hereby notify the Court and the parties of the status of the National Marine Fisheries Service's ("NMFS") consideration of the mixed-stock exception, set forth in the guidelines for National Standard 1 of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act" or "MSA"). As Federal Defendants' have complied with the Court's Order, Federal Defendants also respectfully request that the Court lift the injunction suspending the 2:1 DAS counting as specified in the Court's February 17, 2009 Order.

Pursuant to the Court's January 26, 2009 Memorandum and Order, Dkt. No. 38 ("Order"), Federal Defendants are required to analyze the applicability of the mixed-stock exception and file a report of their findings with the Court no later than March 27, 2009. Id. at 7. The Court ordered the New England Fishery Management Council ("Council") to conduct the review of the mixed-stock exception "under the supervision of NMFS and Commerce." See id., n. 4.

As explained in the attached Second Declaration of Patricia A. Kurkul, NMFS Northeast Regional Administrator, ("Second Kurkul Declaration"), shortly after the Court issued its Order, NMFS prepared a draft report analyzing the applicability of the mixed-stock exception to Framework 42. See id. at ¶ 4. NMFS presented its draft report to the Council at a February 10, 2009 meeting, and asked the Council to endorse the report. See id. at ¶ 5. After discussion, the majority of Council members voted to pass a motion that disagreed with NMFS' determination that the mixed-stock exception cannot be applied to the northeast multispecies fishery, and which requested that NMFS reconsider its position in light of the Council's view of congressional intent. See id. at ¶¶ 6-7. The Council decided that, in light of time constraints, it would not undertake any further analysis of the mixed stock exception. Id. at ¶ 8.

NMFS reconsidered the conclusions of the draft report, as the Council requested, and has prepared a revised report, filed herewith as Attachment D to the Second Kurkul Declaration. In the revised report, NMFS prepared an Addendum specifically to address the passage of the Council's motion that disagreed with the draft NMFS report. In the Addendum NMFS concluded that the premise of the Council's motion – *i.e.* the Council's interpretation of Congressional intent – was not correct and that the analysis contained in the revised report justified NMFS' conclusion that the mixed-stock exception cannot apply to this fishery.

As the Addendum explains, the mixed-stock exception applies only to the Magnuson-Stevens Act requirement for ending overfishing, and not to the requirement to rebuild overfished stocks. See Second Kurkul Decl., Attachment D at 11. Thus, the mixed-stock exception may only be applied to overfished stocks if: (a) the exception would be consistent with rebuilding requirements; and (b) the conditions stated in the guidelines are satisfied. See id.<sup>1/</sup> Therefore, as

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<sup>1/</sup> Under the version of the Magnuson-Stevens Act National Standard 1 Guidelines ("Guidelines") implemented in 1998, the Council could permit overfishing of one stock in a multispecies fishery in order to permit harvest of another species at its optimum level only if:

- (I) It is demonstrated by analysis . . . that such action will result in long-term net benefits to the Nation.
- (ii) It is demonstrated by analysis that mitigating measures have been considered and that a similar level of long-term net benefits cannot be achieved by modifying fleet behavior, gear selection/configuration, or other technical characteristic in a manner such that no overfishing would occur.
- (iii) The resulting rate or level of fishing mortality will not cause any species or evolutionarily significant unit thereof to require protection under the ESA.

50 C.F.R. § 600.310(d)(6). On January 16, 2009, NMFS published new Guidelines that became effective on February 17, 2009. See 74 Fed. Reg. 3178 (Jan. 16, 2009). The 2009 Guidelines contain a revised mixed-stock exception, which clarifies that the exception cannot be employed to exempt stocks from rebuilding requirements:

Before a Council may decide to allow this type of overfishing, an analysis must be performed and the analysis must contain a justification in terms of overall benefits,

communicated to the Council, NMFS has determined that because neither the Council nor NMFS could make the required threshold showing that rebuilding requirements could be met if the mixed-stock exception were employed, under either the 1998 Guidelines or the 2009 Guidelines, applying the mixed stock exception was not a viable alternative for Framework 42. See id. at 10-12. As further support for its position that the mixed-stock exception could not be used to the detriment of the existing rebuilding targets, the revised report cites to many judicial opinions issued in Magnuson Act cases which support the principle that if measures designed to mitigate impacts on the fishing industry would jeopardize a fishery's ability to meet conservation objectives, such as rebuilding requirements, then conservation measures must dictate the outcome. See, Attachment D to Second Kurkul Declaration, at 4 n.2.

As explained above, after noting its disagreement with the NMFS draft report, the Council did not undertake an independent consideration of the applicability of the mixed-stock

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including a comparison of benefits under alternative management measures, and an analysis of the risk of any stock or stock complex falling below its [Minimum Stock Size Threshold ("MSST")]. The Council may decide to allow this type of overfishing if the fishery is not overfished and the analysis demonstrates that all of the following conditions are satisfied:

- (1) Such action will result in long-term net benefits to the Nation;
- (2) Mitigating measures have been considered and it has been demonstrated that a similar level of long-term net benefits cannot be achieved by modifying fleet behavior, gear selection/configuration, or other technical characteristic in a manner such that no overfishing would occur; and
- (3) The resulting rate of fishing mortality will not cause any stock or stock complex to fall below its MSST more than 50 percent of the time in the long term, although it is recognized that persistent overfishing is expected to cause the affected stock to fall below its Bmsy more than 50 percent of the time in the long term.

Id. at 3213.

exception at its February 10, 2009 meeting. See Second Kurkul Decl. at ¶ 9. Although NMFS has reconsidered its report, as requested by the Council, the Council will not have an opportunity to consider the revised report prior to the Court’s March 27, 2009 deadline, because the Council’s next scheduled meeting is April 7-9, 2009. See id. at ¶ 4. Nor can NMFS order the Council to undertake a review of the revised report. As Federal Defendants have previously explained, NMFS has no authority to require the Council to take action, but may only request that the Council take its report into consideration. See Federal Defendants’ Memorandum in Support of Federal Defendants’ Motion to Alter or Amend the Court’s Order and in Support of Motion for Stay Pending Resolution of Motion, Dkt. No. 40 (February 2, 2009) (“Memorandum”), at 4-5.

No provision of the Magnuson-Stevens Act gives NMFS the authority to compel the Council to consider particular measures. Through the Magnuson-Stevens Act, Congress delegated to the Secretary of Commerce “broad authority to manage and conserve coastal fisheries,” and created independent regional fishery management councils to assist the Secretary in carrying out specific management and conservation duties. Kramer v. Mosbacher, 878 F.2d 134, 135 (4th Cir. 1989). A council’s “principal task is to prepare fishery management plans [“FMPs”] for its area, which must ‘assess and specify the present and probable future condition of, and the maximum sustainable yield’ of a fishery.” Id. (quoting 16 U.S.C. §§ 1852, 1853). Pursuant to the Magnuson-Stevens Act, NMFS approves, partially approves, or disapproves FMPs developed by a council and implements the plans through regulations. See 16 U.S.C. § 1854(a), (b). The council submits the FMP to NMFS along with proposed regulations that the council “deems necessary or appropriate” to implement the FMP or FMP amendment. See id. §

1853(c). Both the FMP or amendment and any necessary implementing regulations are subject to public review and comment. See id. § 1854(a)(1),(b)(1).

NMFS may disapprove a FMP or amendment, in whole or in part, only to the extent it is inconsistent with applicable law, and may not substantially modify plans submitted by the Council. See id. § 1854(a)(3). Only under certain limited circumstances may the Secretary take the lead in preparing a plan or plan amendment. See 16 U.S.C. § 1854(c)(1) (Secretary may prepare plan or amendment where: (a) the council fails to develop and submit a necessary amendment; (b) the Secretary disapproves or partially approves an amendment, and the council fails to submit a revised amendment; or (c) the Magnuson-Stevens Act expressly grants to the Secretary authority to prepare a plan amendment). This reflects Congress' intent that the councils – which include federal, state and territorial fishery management officials, participants in commercial and recreational fisheries, and other individuals with scientific experience or training in fishery conservation and management – have the primary responsibility for preparing fishery management plans. See id. § 1852(b). See also Commonwealth of Mass. ex rel. Div. of Marine Fisheries v. Daley, 170 F.3d 23, 27-28 (1st Cir. 1999) (“The [MSA’s] main thrust is to conserve the fisheries as a continuing resource through a mixed federal-state regime; the [fishery management plans] are proposed by state Councils but the final regulations are promulgated by the Secretary through the Fisheries Service.”).

The statute does not establish a supervisory role for NMFS or the U.S. Department of Commerce over the actions of the Council. Rather, NMFS may only request that the Council take action. For example, if NMFS identifies a species as overfished, the agency must notify the appropriate council and “request that action be taken to end overfishing in the fishery and to

implement conservation and management measures to rebuild affected stocks of fish.” 16 U.S.C. § 1854(e)(2). NMFS has no authority to order the Council to implement particular measures. If a Council declines to act on a measure proposed by NMFS, NMFS’ recourse would be to propose its own FMP, amendment or regulation. See 16 U.S.C. § 1854(e)(5). Here, NMFS has complied with the terms of the Court’s Order within the confines of its authority under the Magnuson-Stevens Act by undertaking a serious consideration of the mixed-stock exception, and requesting that the Council consider the issue.

Nor does the Court have jurisdiction to order the Council to review the mixed-stock exception, because the Council is not a party to this lawsuit and could not have been sued under the Magnuson-Stevens Act. The judicial review provisions of the Magnuson-Stevens Act cannot give rise to a claim to challenge actions of the Council, because they apply only to regulations promulgated by the Secretary of Commerce. See 16 U.S.C. § 1855(f) (authorizing suit to challenge only regulations or actions implementing a fishery management plan). As the judicial review provisions of the Magnuson Act constitute a waiver of sovereign immunity, these provisions must be interpreted narrowly. See United States v. Nordic Village, 503 U.S. 30, 37 (1995). The limited nature of a waiver extends to the formulation of relief. “The Government’s consent to a particular remedy must be unambiguous.” Army v. FLRA, 56 F.3d 273, 277 (D.C. Cir. 1995). The relevant judicial review provision at 16 U.S.C. § 1855(f)(1) allows a reviewing court only to set aside regulations *issued by the Secretary* in accordance with the review provisions of the Administrative Procedure Act, 5 U.S.C. § 706(2). Because waiver of sovereign immunity under the Act in Section 1855(f) applies only to challenges to regulations promulgated under the Act, it does not authorize suits raising claims related to the councils. See, e.g., Delta

Commercial Fisheries Association v. Gulf of Mexico Fishery Management Council, 364 F.3d 269, 273-274 (5th Cir. 2004) (partial waiver of sovereign immunity under Section 1855(f) does not permit challenge to composition of council).

When Congress intended to create a private right of action in the Magnuson-Stevens Act, it did so expressly and was precise in delineating the actions that could be challenged. The absence of a similar right of action to challenge actions taken by the councils strongly indicates that Congress did not intend such actions to be challenged. Russello v. United States, 464 U.S. 16, 23 (1983), quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972) (when “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). Thus, since Plaintiffs would not have a claim directly against the Council for failure to undertake a review of the mixed-stock exception, it follows that no judicial remedy may be issued to achieve such a result.

In sum, NMFS submits this report to notify the Court that it has taken the actions the Magnuson Act allows to put before the Council its consideration of the mixed-stock exception. As required by the Court’s order, NMFS seriously considered and analyzed the exception, then concluded it was not an appropriate or viable alternative for Framework 42.

## **CONCLUSION**

For the foregoing reasons, Federal Defendants respectfully request that the Court determine that they have complied with the terms of the Court’s January 26, 2009 Order, and enter judgment in Federal Defendants’ favor on Count II of Plaintiffs’ Complaint. In light of NMFS’ consideration of this alternative, Federal Defendants further request that the Court lift



the injunction suspending the 2:1 DAS counting that is required by the Court's February 17, 2009 Order.

Dated: February 19, 2009

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (“NEF”) and paper copies will be sent to those indicated as non registered participants on February 19, 2009.

/s/ Kristen Byrnes Floom